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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91249427
Party	Defendant Cyberman Security, LLC AKA The CyberHero Adventures: Defenders of the Digital Universe
Correspondence address	MAXIM H WALDBAUM RIMON PC 100 PARK AVENUE, 16TH FLOOR NEW YORK, NY 10017 UNITED STATES Primary email: maxim.waldbaum@rimonlaw.com Secondary email(s): tad.prizant@rimonlaw.com, anna.freyman@rimonlaw.com 917-603-3905
Submission	Opposition/Response to Motion
Filer's name	Maxim H. Waldbaum
Filer's email	maxim.waldbaum@rimonlaw.com, anna.freyman@rimonlaw.com, tad.prizant@rimonlaw.com
Signature	/Maxim H. Waldbaum/
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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

**EVOLUTIONARY GUIDANCE
MEDIA R&D INC.,**

Opposer,

V.

**CYBERMAN SECURITY, LLC AKA
THE CYBERHERO ADVENTURES;
DEFENDERS OF THE DIGITAL
UNIVERSE**

Applicant

**CYBERMAN SECURITY, LLC AKA
THE CYBERHERO ADVENTURES;
DEFENDERS OF THE DIGITAL
UNIVERSE**

Opposer

V.

**EVOLUTIONARY GUIDANCE
MEDIA R&D INC.,**

Applicant

Opposition No. 91249427

Serial No. 88219305

Mark: THE CYBERHERO ADVENTURES; DEFENDERS OF THE DIGITAL UNIVERSE

Published: May 14, 2019

Opposition No.: 91253845

Serial No. 88293133

Mark: CYBERHERO

Published December 3, 2019

**CYBERMAN SECURITY, LLC’S RESPONSE TO
EVOLUTIONARY GUIDANCE MEDIA R&D INC.’S MOTION TO STRIKE**

Cyberman Security, LLC (hereinafter “Cyberman”), Opposer in Opposition No. 901253845 (“845 Opposition”) and Applicant in Opposition No. 91249427 (“427 Opposition”), submits this brief in response to Evolutionary Guidance Media R&D Inc.’s (hereinafter “EGM”) Motion to Strike Cyberman’s Trial Brief and attached Exhibits (hereinafter “Motion to Strike” or “Motion”).

ARGUMENT

In its Motion to Strike, EGM argues that “all accompanying exhibits [to Cyberman’s Trial Brief] ... and any arguments made by [Cyberman] that refer to the improperly submitted exhibits” should be stricken. *See* Motion to Strike at 1.¹ Yet, the Motion is without merit to the extent it asks to strike exhibits that are duplicative of previously submitted material contained in the record. The Motion further lacks any legal foundation with regard to striking parts of Cyberman’s Trial Brief.

1. EGM’s request to strike the exhibits are improper to the extent the exhibits are duplicative of material that is part of the record.

EGM’s request to strike all exhibits Cyberman submitted with its Trial Brief is improper. Pursuant to the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), Section 539 “[e]videntiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party. If evidentiary material not of record is attached to a brief on the case, an adverse party may object thereto by motion to strike or otherwise.” Along those lines, any material in the Appendix that is part of the record must not be stricken.

Here, the Appendix Cyberman filed with its Trial Brief partly contains documents that had previously been submitted and were thus properly made of record. This is true for Appendix 065-086 which has been disclosed as part of Cyberman’s Pretrial Disclosures to EGM. *See* Exhibit E to Cyberman’s Pretrial Disclosures to EGM, served on EGM on May 7, 2021. Specifically, the evidence showed that the mark CYBERHERO is generic.

¹ Cyberman filed with its Trial Brief an Appendix which EGM refers to in its Motion to Strike as “exhibits.” For the purpose of this response, the terms “exhibits” and “Appendix” will be used interchangeably.

Given that these documents are on the record, they must not be stricken.

2. EGM does not properly specify what parts of Cyberman’s Trial Brief should be stricken and there is no legal foundation for striking portions of the Trial Brief.

The Motion to Strike has no ground to stand on to the extent it requests that unspecified portions of the Trial Brief should be stricken.

Section 539 of the TBMP clearly holds that “when a brief on the case has been regularly filed, the Board *generally will not strike the brief, or any portion thereof*, upon motion by an adverse party that simply objects to the contents thereof.” (emphasis added). A motion to strike is only appropriate “if a brief on the case is not timely filed, or violates the length limit or other format requirements specified in 37 C.F.R. § 2.128(b).” *Id.* None of those circumstances exists here – nor does EGM plead any of them in its Motion. Instead, EGM makes a generically broad attempt to do away with Cyberman’s substantive arguments. This directly contradicts TBMP Section 539 which states that “any objections that an adverse party may have to the contents of a brief should be stated in a responsive brief, if allowed, and will be considered by the Board in its determination of the case, and any portions of the brief that are found by the Board to be improper will be disregarded.” Accordingly, if EGM wishes to object to the arguments contained in Cyberman’s Trial Brief, it can do so by way of filing a responsive brief – not a motion to strike. For that reason alone, EGM’s Motion to Strike should be denied.

This is further supported by the fact that Cyberman “is entitled to offer in its brief on the case any argument it believes will be to its advantage.” *Id.* Along those lines, portions of the Trial Brief that directly support Cyberman’s contentions relevant to the outcome of the consolidated proceedings can – by definition – not be subject to a motion

to strike. See *Nautica Apparel, Inc.*, No. CANCELLATION 9206476, 2020 WL 6255441, at *21 (Oct. 21, 2020) (denying motion to strike certain portions of a trial brief, because those portions amplify Respondent’s denials of a likelihood of confusion”). It is therefore simply irrelevant whether any of the arguments made by Cyberman refer to the (allegedly) improperly submitted exhibits. As long as they amplify Cyberman’s position in the opposition proceedings, they must not be stricken.

Here, every single argument raised in the Trial Brief which references the exhibits directly supports issues relevant to both Cyberman’s Opposition to registration of EGM’s applied-for-mark CYBERHERO, as well as application of Cyberman’s mark THE CYBERHERO ADVENTURES: DEFENDERS OF THE DIGITAL UNIVERSE (“CYBERHERO ADVENTURES”).

Specifically, the arguments pertain to three categories of issues:

(1) the strength of the mark CYBERHERO ADVENTURES and the goodwill developed therein both of which directly relate to Cyberman’s denial of a likelihood of confusion between CYBERHERO ADVENTURES and EGM’s registered mark CYBERHERO LEAGUE;

(2) the strength (or rather weakness) of EGM’s mark CYBERHERO LEAGUE which also relates to Cyberman’s denial of a likelihood of confusion; and

(3) the genericness of EMG’s applied-for-mark CYBERHERO.

The below table illustrates this point, i.e., that each argument in the Trial Brief that references the Appendix can be matched with one of the above issue categories, all of which directly amplify Cyberman’s position in the opposition proceedings and all of which have been presented by Cyberman in its previous pleadings:

References to Appendix in Cyberman's Trial Brief	Issue(s) to which Appendix citations pertain	Issue(s) previously raised in
Trial Brief, at 2: "By contrast, and unlike EGM suggests, the Cyberman Mark ever since its first use in commerce in May 2018, has developed into a well-renowned cybersecurity educational tool invented by Gary Berman who has made it his life mission to inform the public on cyber and media security. As part of this mission, Mr. Berman has also created a television show in which he has interviewed numerous high-profile personalities and experts in the field. (App. 004; 037-038)."	<u>Likelihood of confusion</u> (specifically strength of the mark CYBERHERO ADVENTURES, and goodwill developed therein).	Cyberman's Opposition No. '845 – See 1 TTABVUE; Cyberman's Opposition To Motion For Suspension in Opposition No. '845 – See 6 TTABVUE;
Trial Brief, at 2: "Mr. Berman has also created a network of over 20,000 followers on LinkedIn and participated in over fifty cybersecurity conferences – all under the Cyberman Mark. (App. 004; 009; 042; 052)."		Cyberman's Answer to EGM's Opposition No. '427 – See 4 TTABVUE.
Trial Brief, at 5: "Cyberman also owns the domain www.cyberherocomics.com which talks about Cyberman's mission and comics. (App. 037-047);"		Cyberman's Opposition No. '845 – See 1 TTABVUE, and Exhibit A thereto.
Trial Brief, at 5: "there already have been over 100 episodes, each and every one featuring thought leaders throughout the cybersecurity and IT communities. (App. 052)."		Cyberman's Opposition No. '845 – See 1 TTABVUE;
Trial Brief, at 5: "Former guests include, among others, Sam Visner, Tech Fellow at MITRE and former advisor to the National Security Agency; Dr. Chase Cunningham, author of "Cyber Warfare" and CSO of Ericom Software; Dr. Herb Roitblat, author of "Algorithms are Not Enough" and former Principal Data Scientist at Mimecast; Phil Bove, National Security Agency; Shahid Shah, Founder/Publisher of Netspective Media and Matt Desch, CEO of Iridium Communications. (App. 010-038)."		Cyberman's Opposition To Motion For Suspension in Opposition No. '845 – See 6 TTABVUE; Cyberman's Answer to EGM's Opposition No. '427 – See 4 TTABVUE.
Trial Brief, at 5: "Given these efforts, the Cyberhero Adventure Show and CYBERHERO ADVENTURE comics have become leading in the cybersecurity field and		

are perceived by experts as a reliable source and partner in the field of cybersecurity. (App. 006; App. 046-047)."		
Trial Brief, at 5: "Moreover, Mr. Berman's connections have grown steadily since the first commercial use of the Cyberman Mark. As of December 2021, Mr. Berman has over 20,000 followers on LinkedIn, including some of the key players in the cybersecurity ecosystem. (App. 004; 009; 016; 042; 054-56)."		
Trial Brief, at 10: "Cyberman has also provided evidence to that effect, i.e., that the term "CYBER" is commonly used in the realm of internet related goods and services. (App. 065-086)."	<u>Likelihood of confusion</u> (specifically, weakness of EGM's mark CYBERHERO LEAGUE); <u>Genericness of "Cyberhero."</u>	Cyberman's Opposition No. '845 – See 1 TTABVUE, Exhibit C; Cyberman's Pretrial Disclosures to EGM, Exhibit E.
Trial Brief, at 20: "Cyberman has provided ample evidence showing that the term "CYBERHERO" has been in common use since as early as the 1980s and typically refers to a form of an "internet" hero that represents and assists individuals who use the internet and digital technologies for other people, animals and the environment with the goal of achieving humanity's highest ideals and aspirations, including world peace, social justice, environmental protection and planetary stewardship. (App. 065-086)."	<u>Genericness of "Cyberhero."</u>	Cyberman's Answer to EGM's Opposition No. '427 – See 4 TTABVUE, Exhibits 1—17; also incorporated as Exhibit B to Cyberman's Opposition No. '845 – See 1 TTABVUE.

The table clearly show that in many instances in which the Trial Brief references the Appendix. It also references other documents on the record in support of the same contention. Most arguments which refer to the Appendix did thus not even rely on the (additional) material submitted in the Appendix. Therefore, even if it were true that arguments in trial briefs that refer to new evidence were subject to motions to strike – *which it is not* – most arguments in Cyberman's Trial Brief would still survive such

motion as they are supported by material contained in the record. EGM's Motion to Strike ignores that and instead conflates the basis for striking portions of the brief and evidence submitted with the brief. Only the latter is proper under TPMB, Section 539.

Lastly, EGM does not cite a single case supporting its notion that a motion to strike with regard to portions of the brief is warranted under the circumstances. Rather, the cases EGM cites in its brief merely stand for the proposition that new evidence submitted with a trial brief cannot be given any consideration by the Board. Accordingly, in none of the cases EGM relies on did the Board strike portions of briefs. For example, in *Hole in 1 Drinks, Inc.*, No. CANCELLATION 9206586, 2020 WL 859853 (Feb. 19, 2020), the Board explicitly only granted petitioner's motion to strike to the extent it pertained to the new evidence, not to the extent it also sought to strike the brief itself or portions thereof. ("We grant Petitioner's motion to the extent that we will not consider the evidence attached to Respondent's brief. However, because the brief is only seven pages in length and clearly not an attempt to circumvent the Board's page limits, we deny Petitioner's motion to the extent that the Board, in its discretion, will consider Respondent's arguments in his brief, for whatever persuasive value they may have despite his failure to properly format the brief." At 3.). Similarly, the Board in *Syngenta Crop Prot., Inc. v. Bio-Chek, LLC*, 90 U.S.P.Q.2d 1112 (T.T.A.B. 2009) merely struck notices of reliance. The same is true for *Lincoln National Corp. v. Anderson*, 110 USPQ2d 1271, 1274 n.5 (TTAB 2014) (evidence submitted for the first time with applicant's trial brief not considered); *Plus Products v. Physicians Formula Cosmetics, Inc.*, 198 USPQ 111, 112 n.3 (TTAB 1978) (applicant's exhibits attached to its brief cannot be considered); see also *Angelica Corp. v. Collins & Aikman Corp.*, 192 USPQ 387, 391 n.10 (TTAB 1976)

(“Evidence submitted by opposer for the first time with its brief has not been considered because it was not regularly made of record during its testimony period in chief or rebuttal testimony period.”).

All of this shows that EGM’s Motion to Strike should be denied to the extent it asks for parts of the Trial Brief to be stricken.

CONCLUSION

For the reasons set forth above, Cyberman respectfully requests the Board to deny EGM’s Motion to Strike portions of Cyberman’s Trial Brief as well as to the extent it requests to strike all exhibits including those who have been properly made of record.

Respectfully submitted,

DATED this 14th day of January 2022.

RIMON, P.C.

By: /s/Maxim H. Waldbaum
Maxim H. Waldbaum,
NY Reg. No. 1532795
100 Park Ave., 16th Fl.
New York, NY 10017
(917) 603-3095
maxim.waldbaum@rimonlaw.com
Attorney for Applicant in Opposition
‘427 and Opposer in Opposition ‘845

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, a copy of Cyberman Security LLC's Response to Evolutionary Guidance Media R&D Inc.'s Motion to Strike has been served on Evolutionary Guidance Media R&D Inc.'s attorney of record as follows:

MLowry@wlj.com

Meredith K. Lowry, AR Bar 2005232
WRIGHT LINDSEY & JENNINGS LLP
3333 Pinnacle Hills Pkwy. Ste. 510
Rogers, AR 72758

Attorney for Opposer in Opposition '427 and Applicant in Opposition '845

/s/Tad Prizant
Tad Prizant